

U. S. DEPARTMENT OF LABOR  
Employees' Compensation Appeals Board

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In the Matter of JERALD E. JOHNSON and DEPARTMENT OF AGRICULTURE,  
U.S. FOREST SERVICE, Colville, WA

*Docket No. 00-1267; Submitted on the Record;  
Issued April 2, 2001*

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DECISION and ORDER

Before DAVID S. GERSON, MICHAEL E. GROOM,  
PRISCILLA ANNE SCHWAB

The issue is whether appellant's hearing loss claim is barred by the three-year time limitation of section 8122 of the Federal Employees' Compensation Act.<sup>1</sup>

On April 1, 1999 appellant, then a 56-year-old retired engineering technician, filed a notice of occupational disease for hearing loss allegedly sustained in the performance of duty. Appellant worked at the employing establishment from April 1966 until his retirement on January 3, 1995, in various positions in forestry, engineering and construction.<sup>2</sup> He alleged exposure to noise from chain saws, wood chippers, jackhammers, dynamite blasts, motorcycles, helicopters and dump trucks, noting that no hearing protection was provided to him.

Appellant first noticed a decrease in hearing "in the early 1970s," adding that he "had an amplifier installed on [his] work phone in the mid 1980s." Appellant related his hearing loss "to loud noises in [his] past about 1990 or 1992 when it became apparent to people around [him] that [he] was having difficulty hearing."

Appellant submitted a February 2, 1999 audiogram. For the left ear at 500, 1,000, 2,000 and 3,000 hertz, thresholds of 10, 15, 65 and 75 decibels were noted. For the left ear at 500, 1,000 and 2,000 hertz, thresholds of 10, 30 and 85 decibels were reported. The examiner was not able to obtain a result at 3,000 hertz for the left ear.

Appellant purchased bilateral hearing aids on February 17, 1999.

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<sup>1</sup> 5 U.S.C. §§ 8101-8193.

<sup>2</sup> Following his retirement from federal employment, appellant worked on a seasonal basis for a private sector lumber company from 1996 to November 1998, with exposure to noise from chain saws, dump trucks and heavy equipment. Appellant noted that he was provided with foam earplugs, which he wore while at work for the lumber company.

A February 23, 1999 audiogram showed thresholds for the right ear at 500, 1,000, 2,000 and 3,000 hertz of 10, 20, 60 and 70 decibels and on the left at those frequencies, 10, 20, 80 and 95 decibels.

In a September 10, 1999 letter, Robert Lynn Scott, an employing establishment official, controverted appellant's claim, as "safety programs include hearing protection as a normal course of events.... We would also like to indicate our concern about the increasing number of hearing loss claims filed primarily by retired former employees ... and followed by requests for schedule awards."

In a September 16, 1999 letter, the Office of Workers' Compensation Programs advised appellant of the type of factual and medical evidence needed to establish his claim. The Office requested that appellant explain whether he provided written notice of his hearing loss to the employing establishment within 30 days of his retirement, or whether his "immediate superior had actual knowledge of [the claimed] hearing loss." The record indicates that appellant did not respond to the Office's request.<sup>3</sup>

In a September 16, 1999 letter, the Office requested that the employing establishment describe appellant's history of occupational noise exposure and provide any relevant factual and medical information.

In a September 29, 1999 response letter, Mr. Scott stated that appellant's claim was "clearly" not timely. Mr. Scott referred to the Office's denial of a similar untimely claim filed by one of its retired employees and stated:

"We are wondering if the same approach and result would not be appropriate in [appellant's] case, thus making unnecessary the attempt at answering a number of questions it will be difficult to answer regarding a retired employee's former status as best we might be able to reconstruct it."

He asked the Office to advise him further.

In a December 9, 1999 telephone memorandum, the Office noted that the employing establishment verified that appellant was not covered under a hearing conservation program when employed -- they are just now setting up such a program. The memorandum added that none of the employees appellant worked with was aware of his hearing loss.

By decision dated December 9, 1999, the Office denied appellant's claim on the grounds that it was untimely filed. The Office found that appellant did not file his claim within three years of retiring in 1995. The Office stated that the employing establishment had verified that it did not have any form of notification of a work-related hearing loss at the time appellant retired in 1995. Further, the Office found that the employing establishment did not at that time have a hearing conservation program that might have documented an employee's noise-induced hearing

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<sup>3</sup> On appeal, appellant asserted that he did not respond to the Office's September 16, 1999 letter as he had provided the requested information accompanying his claim form.

loss. The Office noted that appellant's supervisor had retired and was not available for comment.

The Board finds that appellant's claim for a hearing loss was untimely filed.

Section 8122(a) of the Act states: "An original claim for compensation for disability or death must be filed within three years after the injury or death."<sup>4</sup> Section 8122(b) provides that in latent disability cases, the time limitation does not begin to run until the claimant is aware, or by the exercise of reasonable diligence should have been aware, of the causal relationship between his employment and the compensable disability.<sup>5</sup> The Board has held that, if an employee continues to be exposed to injurious working conditions after such awareness, the time limitation begins to run on the last date of this exposure.<sup>6</sup>

In this case, the time limitation for filing a claim began to run on January 3, 1995, when appellant was last exposed to the employment conditions that he alleged caused his hearing loss. Appellant did not file his claim until April 1, 1999, beyond the three-year time limitation, which ended on January 2, 1998.

However, appellant's claim would still be regarded as timely under section 8122(a)(1) of the Act if his immediate supervisor had actual knowledge of the injury within 30 days. The knowledge must be such as to put the immediate superior reasonably on notice of an on-the-job injury or death.<sup>7</sup> Thus, appellant's claim would be timely if his immediate supervisor had actual knowledge of the injury no more than 30 days after he retired on January 3, 1995. The record indicates that appellant's supervisor had retired and was unavailable to respond to inquiries from the employing establishment. The record also indicates that appellant did not respond to the Office's question of whether he had provided written notice to his supervisor within 30 days of retirement. Appellant mentioned that he had an amplifier installed on his work telephone in the mid 1980s, but he provided no evidence that the employing establishment was aware of his hearing loss and its relationship to work at that time.

While the employing establishment generally has custody of several types of relevant documents, such as environmental noise surveys, audiograms, dispensary records and hearing conservation program data, that are essential to the fair adjudication of a claim, it is appellant's burden to submit the evidence necessary to adjudicate his claim, in hearing loss cases. The employing establishment stated that it had no hearing conservation program in place during appellant's employment. Appellant stated that "it became apparent" to people around him in 1990 to 1992 that he was having difficulty hearing, but he provided no further evidence that his supervisory or the employing establishment had notice at that time that he considered his hearing

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<sup>4</sup> 5 U.S.C. § 8122(a).

<sup>5</sup> 5 U.S.C. § 8122(b).

<sup>6</sup> *Charlene B. Fenton*, 36 ECAB 151, 157 (1984); *Gladys E. Olney*, 32 ECAB 1643, 1645 (1982).

<sup>7</sup> 5 U.S.C. § 8122(a)(1); *See Jose Salaz*, 41 ECAB 743, 746 (1990); *Kathryn A. Bernal*, 38 ECAB 470, 472 (1987).

loss to be work related. The record indicated that he sought no treatment of this condition until February 1999.

In as much as appellant did not file his claim within the three-year time limit and failed to establish that the employing establishment had notice of an occupational hearing loss, the Board finds that the Office properly denied his claim as untimely filed.

The December 9, 1999 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, DC  
April 2, 2001

David S. Gerson  
Member

Michael E. Groom  
Alternate Member

Priscilla Anne Schwab  
Alternate Member